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No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

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IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term 1986

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LUIS I. BATAYOLA  
Petitioner

v.

MUNICIPALITY OF METROPOLITAN SEATTLE,  
a municipal corporation  
Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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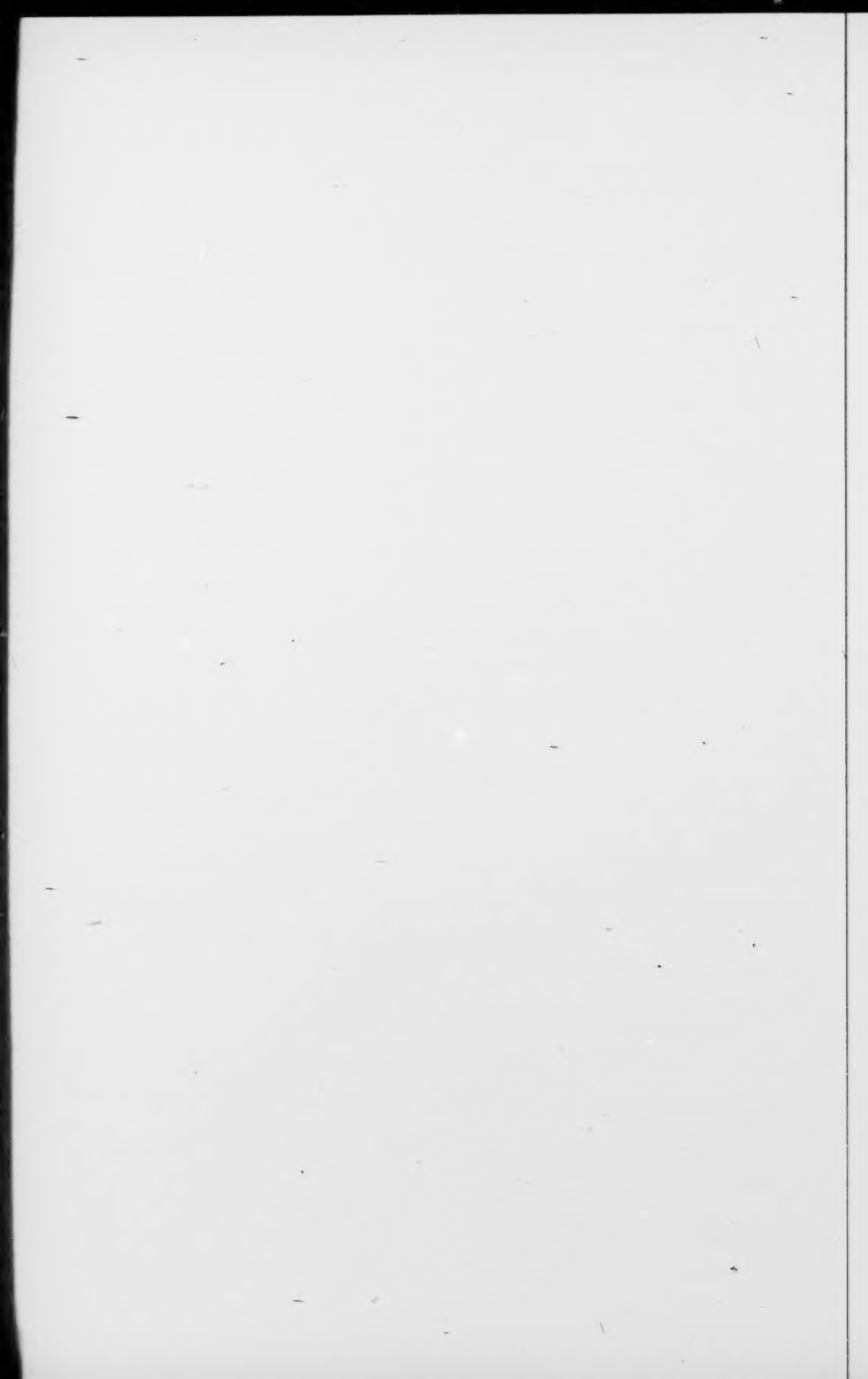
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i.

## **I. QUESTIONS PRESENTED**

1. Whether the Circuit Courts are correctly interpreting the provisions of 38 U.S.C. 2021(a)(B)(i), 2021(b)(3), and 2024(d) as to the rights of Reservists who sustain missed employment opportunities which accrue at the Reservist's employment while the Reservist is absent attending authorized active duty training.

2. Whether, assuming a Reservist can show a violation of one or more of the specific rights guaranteed by the specific provisions above, the Courts should apply the reasonable certainty test to the remedy or leave to separate proceeding the determination of what the remedy should be.

## **II. LIST OF PARTIES**

Petitioner is Luis I. Batayola, a resident of the State of Washington residing at Seattle.

Respondent is the Municipality of Metropolitan Seattle, a municipal corporation organized and existing under the laws of the State of Washington.

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The Petitioner Luis I. Batayola respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered August 21, 1986, as amended November 13, 1986.

OPINION BELOW

The Ninth Circuit's divided opinion as

amended, reported at 798 F. 2d 355, appears in Appendix A, pp. A-1 through A-20, to this petition. The Ninth Circuit's divided opinion of August 21, 1986, appears in Appendix B to this petition, pp. B-1 through B-20. The opinion of the trial court, the United States District Court for the Western District of Washington, dated April 26, 1985, is unreported and appears in Appendix A, pp. A-21 through A-24, to this petition. The judgment of the trial court, as amended, appears in Appendix A, pp. A-25 through A-28, to this petition.

#### JURISDICTION

The Ninth Circuit's split decision was rendered on August 21, 1986, and thereafter amended by order dated November 13, 1986. A timely petition for re-hearing with suggestion for rehearing en banc filed by petitioner was denied on November 13, 1986. An application by petitioner for an extension of time to file a

petition for a writ of certiorari with the United States Supreme Court was granted on February 3, 1987, by Justice O'Connor, U. S. Supreme Court file No. A-556, extending the time to file to and including April 12, 1987. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Rule 17 of the United States Supreme Court Rules.

#### STATUTORY PROVISIONS INVOLVED

The following statutes are at issue in this case. The relevant portions of each are included in Appendices C through E.

38 U.S.C. 2022 (Appendix C).

38 U.S.C. 2021, subsections (a)(B)(i), (b)(2), and (b)(3) (Appendix D).

38 U.S.C. 2024, subsections (a), (b), and (d). (Appendix E).

#### STATEMENT OF THE CASE

Petitioner Luis Batayola began working as a part-time bus driver for the Municipality of Metropolitan Seattle, a municipal corporation organized and existing under the laws of the State of Washington, hereinafter referred to throughout this petition as "Metro," on May 8, 1980 (ER 2).<sup>1</sup> On February 16, 1982, he was granted a one-month leave of absence for reserve duty training with the U. S. Marine Corps (ER 2). On returning to work on March 18, 1982, he first learned that during his absence Metro had solicited applications from part-time transit operators interested in advancing to full-time positions (ER 2). The application period was opened on February 19, 1982, and closed on February 26, 1982, (ER 2). Upon his return from military training, petitioner promptly attempted to apply for the full-time positions, but Metro refused to let him submit an application because the application period had closed (ER 2). The

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<sup>1</sup> "ER\_\_" refers to the Excerpts of the Record

record does not disclose any other reason why Metro refused to reopen the application process to allow Batayola the opportunity to apply and be included on the list of qualified employees eligible for future promotion.<sup>2</sup> If Batayola had been allowed to apply, he would have been placed on a list of applicants, because of his seniority at the time, eligible for training beginning April 2, 1982, (ER 30).<sup>3</sup>

During the 1982 recruitment period, Metro received applications from 426 part-time transit operators (ER 27). To apply for a full-time position, applicants were required to submit an application form which included their past performance evaluations as determined by their

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<sup>2</sup> At oral argument before the Ninth Circuit, Metro failed to offer any reason for its unwillingness to administer the test to Batayola upon his return.

<sup>3</sup> The dissenting opinion recognized that there was no immediate need to fill full-time positions when the application process closed (App. A-12)

respective supervisors (ER 28, 38).<sup>4</sup>

If Batayola had been permitted to apply for a full-time position and, thus, be within the pool of applicants for consideration to the next step in the selection process, that process consisted of two steps. First, each applicant took a video test in which 65 vignettes were presented covering typical situations a bus driver is likely to encounter (ER 28, 45, 96-114). The score from the video test was then added to the applicant's performance evaluation rating and computed to form a composite standard score (ER 28-29). Of the 426 initial applicants, only 105 scored high enough to proceed to the second phase of the selection process (ER 29). The second step of the selection process consisted of a series of personal interviews (ER 29-30). Applicants who successfully completed

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<sup>4</sup> The performance evaluation took into consideration four areas of the applicant's work record: the employee's attendance record, accident record, disciplinary action record, and customer complaint record (ER 28, 38)

both the video test and the personal interviews were then listed by seniority and scheduled for training (ER 30). Upon completion of the training program, the applicant then became a full-time transit operator (ER 30). Of the 105 applicants interviewed in the February 1982 group, all passed except one (ER 82), and 97 of the applicants received full-time positions (ER 83).

Petitioner, having been denied the right to apply in 1982, applied for the same full-time transit operator's position during the next recruitment period which opened in February 1983. Both the trial court and the Ninth Circuit agreed that Metro's selection process in 1983 was virtually identical to that used in 1982—the same standards were used for the performance evaluations, the same video test was given, and the same focus was maintained for the personal interviews (ER 26). On the video test, petitioner received a standard score of 94 (ER 80) and proceeded to the personal interview phase

(ER 85). He passed the personal interviews and became a full-time transit operator on May 26, 1983 (ER 86).<sup>5</sup>

On October 26, 1984, petitioner, represented at the time by the Department of Justice pursuant to 38 U.S.C. 2022, filed this action under the Vietnam Veterans Readjustment Assistance Act of 1974 (88 Stat. 1578, 38 U.S.C. 2021, et seq.) alleging that Metro violated his statutory reemployment rights by refusing to permit him to apply for a full-time position when he returned from reserve duty training in March 1982 (ER 1-5). Petitioner sought relief in the nature of declaratory relief seeking, among other things, that his seniority, status, and pay be restored the same as if he had continued in the active employment of Metro from the time of entering upon reserve duty training in the armed forces of the United States until the date of his

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<sup>5</sup> Petitioner remained with Metro as a full-time transit operator until February 21, 1984, when he left for a position with the fire department.

reemployment following such duty. He prayed that the trial court set the date of April 2, 1982, as the operative date, the date on which he would have become a full-time transit operator if Metro had permitted him to proceed with the process for attaining that position (ER 3-5).

The U. S District Court granted summary judgment in favor of Metro by written opinion dated April 26, 1985, and entered judgment dismissing the complaint on April 29, 1985, later amending the judgment by stipulation of the parties on May 14, 1985. Petitioner timely filed an appeal to the Ninth Circuit on May 24, 1985. On August 21, 1986, the Ninth Circuit filed a written decision and entered an order affirming the decision of the District Court. The Ninth Circuit amended its decision by Order dated November 13, 1986. Petitioner's Motion for Rehearing was denied on November 13, 1986.

#### REASONS FOR GRANTING THE WRIT

There are two reasons why the Court should issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit in this case.

1. The Ninth Circuit has refused to separate the issue of liability for violation of the Act from the remedy or remedies ultimately available to or growing out of or related to the violation, in contravention of the intent and wording of 38 U.S.C. §2021(a)(B)(i), §2021(b)(3), and §2024(a), (b), & (d)

This Court has repeatedly stated that the duty of the Courts with respect to the Vietnam Veterans Reemployment Act of 1974, 38 U.S.C. §§2021-2026 and its predecessor Act, is to construe the act liberally "for the benefit of those who left private life to serve their country in its hour of great need..." **Fishgold v. Sullivan Drydock & Repair Corp.**, 328 U.S. 275, 285, 66 S.Ct. 1105, 1111, 90 L.Ed 1230 (1946), also quoted in **Alabama Power Co. v. Davis**, 431 U.S. 581, 584, 97 S.Ct. 2002, 2004-2005, 52 L.Ed.2d 595, 599 (1977). Moreover, this Court has been emphatic in its view towards veterans, "He who was called to the colors [is] not to be penalized on his return by reason of

his absence from his civilian job." Fishgold, *supra*, 328 U.S. @ p. 284, 66 S.Ct. @ p. 1111, 90 L.Ed @ p. 1240 (emphasis supplied). Even in *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed2d 1305 (1958), relied on by the majority opinion of the Ninth Circuit, this Court has stated in reference to the predecessor Act, 50 U.S.C. App. § 459(c)(1) and as to veterans, "He is not to be disadvantaged by serving his country. Section 9(c)(1) states that he shall be restored 'without loss of seniority.'" 357 U.S. @ pp. 270-271, 78 S.Ct. @ p. 1226, 2 L.Ed2d @ p. 1310 (emphasis supplied).

Seniority is one of the specific rights now protected in the Act in 38 U.S.C. §§ 2021(b)(1) and 2024(d). The latter section states, as to Reservists of which petitioner is one:

Upon such employee's release from a period of ... inactive duty training ... such employee shall be permitted to return to such employee's position

with such seniority, status, pay and vacations such employee would have had if such employee had not been absent for such purposes.(emphasis supplied)

This Court has had occasion to issue one decision dealing with the rights of a Reservist in **Monroe v. Standard Oil Co.**, 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed2d 226 (1981). In **Monroe** the issue was whether there was any violation of the Act at all, without regard to the remedy as having any effect on the issue, for his employer's refusal to accommodate the Reservist's request to be allowed to adjust his work schedule to complete a 40 hour work week when the employee's military duties conflicted with his employment. In holding against the Reservist on this limited issue by a 5-4 decision, this Court recognized in the majority opinion that "employment opportunities" were one of the protections of the Act, **Monroe, supra**, 452 U.S. @ p. 558-559, 101 S.Ct. @ p. 2516, 69 L.Ed2d @ p. 235 (emphasis supplied). **Monroe, supra**, did not discuss whether the availability of a remedy

was determinative of any violation of the Act.

The majority opinion of the Ninth Circuit in this case failed to discuss the *Monroe, supra*, decision. The minority opinion properly cites the quoted language above from *Monroe, supra*, as the important issue on liability and the violation of a right of petitioner, by distinguishing between the loss of a right to an employment opportunity, which in petitioner's case was the loss of a right to apply for a promotion and to protect his seniority, from the loss of a separate right, which the majority opinion transposed into the immediate right to the promotion itself. "[The majority] applies law that is relevant to a claim of one such right (the right to an automatic promotion) to a claim of a separate right (the right to take a promotional examination), although the latter claim is governed by entirely different principles." (minority opinion, App. A-7)

It is clear from the facts that petitioner was denied the right to apply for a promotion to full-time driver upon his return from military duty training. The conclusion is inescapable that through that denial petitioner lost a promotion opportunity. It is also clear from the facts that those part-time drivers junior to petitioner on the seniority ladder who had the opportunity to apply, did apply, and were promoted obtained seniority over him. The conclusion is equally inescapable that petitioner lost seniority both at that time and ultimately, by about a year, when petitioner was promoted a year later. How can it be gainsaid that petitioner did not suffer a loss through a missed opportunity which is in itself a violation of the Act, all because he was on authorized military duty?

Petitioner agrees with the majority opinion of the Ninth Circuit that the "escalator

principle" of *Fishgold*, *supra*, is sound law,<sup>6</sup> but where the Ninth Circuit errs immediately thereafter is in its reliance on 38 U.S.C. 2021(b)(2) and, specifically, to the word "status." It should be carefully noted that Petitioner was re-hired immediately upon his return in his same status as part-time bus driver, and there was no violation of the Act in this limited sense. What petitioner is concerned about and arguing for is restoring a lost opportunity to him and protecting his seniority, not protecting his status. "Seniority" and "status" are separate words within the Act having separate meanings as applied to the facts and circumstances. Thus, the application of §2021(b)(2) is in error. Moreover, error is

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6 "[The veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold* @ 328 U.S. @ p. 284-285, 66 S.Ct. @ p. 1111, 90 L.Ed @ p. 1240. See also *Oakley v. Louisville & Nashville Railroad Co.*, 338 U.S. 278, 283, 70 S.Ct. 119, 122, 94 L.Ed 87, 91 (1949).

compounded by the failure of the Ninth Circuit to consider the application of § 2021(b)(3) which speaks of not denying an "incident or advantage of employment." That petitioner was denied an incident or advantage of employment is clear. Also, error is compounded by the failure of the Ninth Circuit to consider the application of §2024(d) which, as previously indicated, protects seniority specifically for Reservists. That protection is what petitioner is seeking in this action.

Such broad language of 2021(b)(3) and §2024(d) is designed to give special advantages and protections to Reservists. This has been recognized by the former Chief Justice of this Court in his dissent in *Monroe, supra*, at least as to section § 2021(b)(3): "Such protection is clearly broader than that enjoyed by returning veterans under Sec. 2021(b)(1), but is understandable because the reservist has continuing military commitments requiring his

absence that may disadvantage him in his employment." 452 U.S. @ pp. 568-569, 101 S.Ct. @ p. 2520, 69 L.Ed.2d @ p. 240. The former Chief Justice also added with reference to the same two sections: "Yet, the legislative history also indicates a more expansive congressional purpose of ensuring that reservists are not denied any employment benefit solely because of their willingness to serve this country." 452 U.S. @ p. 571, 101 S.Ct. @ p. 2522, 69 L.Ed.2d @ p. 242 (emphasis in text). Plainly, the majority opinion of the Ninth Circuit has overlooked the essential reason why petitioner filed his claim, ignored the policies of Congress underlying the Act, and erred in failing to consider Sections §§2021(b)(3) and 2024(d).

Petitioner has made out a prima facie violation of the Act, and said violation should have been recognized in the majority opinion. Petitioner has been damaged, as will be more fully developed in the second argument in this

section.

By any measure the issues raised by the petitioner have extremely broad impact, affecting the employment and reemployment rights of the approximately 1,650,000 members of the Ready Reserve components of the U. S. Armed Forces.<sup>7</sup> To members of this group in this military status, loss of an opportunity to apply for a promotion can be as damaging as a loss of a promotion itself. In a very real, practical sense, it is undoubtedly true, in an inactive reserve setting, that, statistically, the loss of an opportunity to apply for promotion and the loss of seniority will occur far more frequently than a claimed loss of promotion.

It is imperative for this Court to review the decision of the Ninth Circuit and the

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<sup>7</sup> "Annual Report of the Reserve Forces Policy Board Fiscal Year 1986," Office of the Secretary of Defense, issued 10 February 1987

precedent the decision establishes, which either does or can affect the rights of a great number of military reservists.

2. The issue of the remedy needs to be separated from the issue of liability for violation of the Act and a separate hearing needs to be ordered to determine the remedy.

This Court must decide whether the majority opinion of the Ninth Circuit properly applied the "reasonable certainty" test to the remedy available, whether immediate or not, thus to look back from that determination whether, if such remedy is not immediately available, there is a violation of the Act in this first instance.

It must be remembered that petitioner did not seek the promotion itself as the right he claimed was violated in 1982; rather, as was previously pointed out, it was the right to apply for promotion as an incident or advantage of employment with the resulting loss of seniority

which was the focus of his claim. As was correctly pointed out by the minority opinion of the Ninth Circuit, "Batayola made out a prima facie case that the Municipality violated his rights under the Veterans Readjustment Assistance Act by refusing to allow him to apply for a full-time position when he returned from training duty." (App. pp. A-12).

Unfortunately, the majority opinion took a different view, misapplying cases of this Court. In **Tilton v. Missouri Pacific Railroad Co.**, 376 U.S. 169, 84 S.Ct. 595, 11 L.Ed2d 590 (1964), this Court, in interpreting **McKinney**, *supra*, and the prior Act, held:

Properly read, therefore, **McKinney** holds that where advancement depends on an employer's discretionary choice not exercised prior to entry into service, a returning veteran cannot show within a reasonable certainty required by the Act that he would have enjoyed advancement simply by virtue of continuing employment during the time he was in military service.  
376 U.S. @ p. 180, 84 S.Ct. @ p. 602, 11 L.Ed2d @ p. 597 (emphasis supplied)

The majority opinion applied the "reasonable certainty" test to the remedy immediately available under the Act as of 1982 for the loss of the right to a promotion itself and stated: "We reject Batayola's contention that because he had a right to apply, he also had a right to a full-time position. The selection process was based on merit. He cannot show with reasonable certainty that full-time positions were awarded by virtue of continuous employment." (App. @ A-5)(emphasis supplied)(the words "continuous employment" emphasized in text)

Such reasoning is clearly an erroneous application of the reasonable certainty test. No one disputes that management discretion was exercised to offer the advancement to full-time positions to all of petitioner's fellow part-time drivers as a class. No one disputes that it is and was reasonably certain that petitioner would have applied for the full-time driver's position at the time of the offer if he would not

have been on military duty. At this point, the denial of the opportunity to apply, even immediately after his return from military duty, must be deemed to be a conclusive violation of the Act without more. However, to go one step further and claim, as does the majority opinion of the Ninth Circuit, that this violation is and should be transformed into a violation of the Act for failing to offer the promotion itself and to apply the reasonable certainty test to the remedy to determine whether the promotion is immediately available as of 1982, not only is erroneous in terms of the claim made, but, insofar as applying that test to the remedy, fails to find support in either precedent or logic. To focus for the moment on the remedy in terms of the argument made in this section, not only as to petitioner but also as to other Reservists who face the same or similar disadvantages, the remedy is and should be as a trial court deems it to be after full analysis of the facts and circumstances of damages which flow from the denial of the

aforesaid opportunity.

Instructive in support of the points made above is **Barrett v. Grand Trunk Western Railroad Company**, 581 F.2d 132 (7th Cir 1978). In **Barrett** the plaintiff-employee was first hired as a "C-2" fireman and some months later was terminated. Later, in April, 1965, he was re-hired, this time as a switchman, and in January, 1966, he was inducted into the U. S. Marine Corps. Upon his release from active duty in 1968, Barrett was reinstated as a switchman. While he was away in May, 1966, his employer sought to re-hire "C-2" firemen, canvassing those terminated along with Barrett. Barrett sought that "C-2" position upon his return along with seniority and backpay from May, 1966. The District Court granted Barrett's Motion for Partial Summary Judgment, granting to Barrett the earlier seniority date and leaving to a subsequent hearing the issues dealing with relief.

The Seventh Circuit affirmed the decision holding, insofar as the issues raised above are concerned:

There is nothing here remotely akin to second-guessing a managerial evaluation of an employee's fitness for promotion, and relief for Barrett would pose no danger of 'overriding an employer's discretionary choice,' which concerned the Court in *McKinney*. 357 U.S. at 272, 78 S.Ct. 1222; see *Pomrening v. United Air Lines, Inc.*, 448 F.2d 609, 613 (7th Cir. 1971). Indeed, all Barrett is asking is to be given the benefit of management's discretionary choice, which was concededly exercised in favor of a class ("C-2" firemen with satisfactory performance ratings) from which he was excluded only because he was currently serving his country. (p. 136).<sup>8</sup>

Like Barrett, petitioner in this case sought an employment opportunity. What Barrett sought was a new status; the petitioner, an opportunity to apply and a protection of his seniority over

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<sup>8</sup> Based on the reasoning and procedure set forth in *Barrett, supra*, petitioner invites this Court to consider summary reversal of the Ninth Circuit decision with an order to remand to the District Court for a hearing as to damages.

his fellow drivers who exercised the same opportunity and were promoted. These distinctions are immaterial insofar as the principle petitioner asks this Court to review, which is to separate the violation from the remedy, as the Court did in **Barrett**.

The majority opinion of the Ninth Circuit cited **McKinney, supra**, without discussion of **Barrett, supra**, as the controlling precedent on the analysis of the procedure to be followed in this case. Unlike McKinney, who sought to retain the position he held as a result of management discretion previously exercised in his favor and to require the court to back-date his seniority immediately over a fellow employee, the petitioner in this case does not ask the Court to assign him immediately nunc pro tunc as of 1982 in the new position of full-time driver, a position he had never attained proximately from the violation of the Act in 1982, viz. the denial of the opportunity to apply. The Court in

McKinney, *supra*, simply could not undo a management discretionary decision based on fitness and ability and on the record before it to give the veteran an unwarranted advantage to the promotion itself over a fellow employee, who would be displaced, simply because of military service. Such is clearly not the case before this Court presently in that in petitioner's case providing for a remedy for the violation rests not in over-riding any discretion having been exercised or which could be exercised to award the promotion itself and, especially, to displace a fellow employee, but to providing a remedy directly and proximately occurring because of the violation as shown in 1982. Unless this is done, the petitioner, and others in his situation in the future, are left with a specific violation of the Act, which has a profound effect on an incident or advantage of employment, without a remedy.

What could petitioner claim as a remedy or

damages if he would have been allowed to show them at trial? Without a doubt he suffered a loss of seniority to those below him on the seniority ladder who were allowed to apply and did become full-time drivers. If petitioner had never been promoted ultimately, money damages would, in all probability, be all that would be available to him, and these money damages would be nominal. But, approximately a year later in 1983, petitioner was promoted, after taking the same tests which the Respondent concedes are essentially the same as taken by the 1982 group. When he was promoted, petitioner ranked in terms of seniority a year behind the group who were junior to him and were promoted in 1982. Assume as a remedy, a trial court would order that petitioner's seniority be restored to a place where he would have been had he been allowed to apply. This would be a reasonable conclusion, but it would leave him in an anomalous situation in that he is left with the seniority he requests, reflecting the date of promotion he did

not request. Using the language of the minority opinion, the Act must be given a common-sense application. Because he did get promoted in 1983 based on essentially the same considerations of fitness and ability, it defies common sense to assign him in 1983 with a seniority date effective in 1982 but not compensate him for the back pay which would have accrued because of his back-dated seniority, which, perforce, as a matter of law, also assigns him concomitantly in a new status.

It is important to add that while such a remedy and this outcome may result, in practical terms in this case, to an award of the promotion itself with backpay, such remedy and this outcome does not flow directly as a result of the claimed violation of a specific right guaranteed by the Act. It does so indirectly. The remedy for a specific violation of the Act could differ from case-to-case depending on the varying factual patterns and claims of any given case. Again,

petitioner should not be left without a remedy.

Another way to approach the remedy issue would be that of the minority opinion of the Ninth Circuit by the following statement:

However, [petitioner] has presented sufficient evidence in support of his claim that he would have been promoted in 1982 to at least raise a material factual issue and thus to avoid an adverse summary judgment on the issues of damages. In fact, the evidence that he would have passed the test is sufficiently persuasive that summary judgment in his favor on the damages issue as well (except for the amount) may, in fact, be the proper result. (App. A-19).

It is time for this Court to clarify and harmonize the ~~McKinney-Tilton-Monroe~~ reasoning in order to give recognition and legal sanction to the rationale of Barrett, supra, and what is requested in this case, as to the losses veterans and Reservists face when denied employment opportunities.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

James Byron Holcomb  
Counsel for Petitioner

April 4, 1987

APPENDIX A

Luis I. BATAYOLA, Plaintiff-  
Appellant

v.

MUNICIPALITY OF METROPOLITAN  
SEATTLE, Defendant-Appellee.

No. 85-3884.

UNITED STATES COURT OF APPEALS,  
NINTH CIRCUIT

Argued and Submitted  
March 4, 1986.

Decided Aug. 21, 1986.

As Amended on Denial of  
Rehearing and Rehearing En Banc  
Nov. 13, 1986.

(356) Appeal from the United States District  
Court for the Western District of Washington.

Before WRIGHT, TANG AND REINHARDT, Circuit  
Judges.

EUGENE A. WRIGHT, Circuit Judge.

In this case we are asked to decide whether  
a part-time employee may be awarded backpay and  
seniority under the Veterans Readjustment  
Assistance Act as a remedy for missing an  
opportunity to apply for a full-time position  
while on military reserve duty training. The  
magistrate found the claimed benefit was not

covered by the Act. We agree and affirm the decision below.

#### FACTS

Batayola began to work as a part-time bus driver for the Municipality of Metropolitan Seattle (Metro) in May 1980. In February 1982, he took a one month leave of absence for Marine Corps reserve duty training. During his absence, Metro solicited applications from part-time bus drivers for full-time positions. When Batayola returned in March 1982, he was reinstated to his part-time position. He attempted to apply for a full-time position, but Metro refused because the recruitment period had ended.

Metro had received 423 applications for full-time work. The application process included performance evaluations, situational response video tests, and personal interviews. Based on Metro's cutoff score, only 105 of the 426 applicants proceeded to personal interviews. Successful applicants from the interviews were recommended for full-time positions and selected

by seniority for training. Upon completion of the training, 97 applicants became full-time drivers.

During a new recruitment period in 1983, Batayola was selected for a full-time position, worked briefly for Metro, resigned and is no longer employed as a driver. He has no seniority rights with Metro. Metro concedes the selection process in 1983 was almost identical to that used in 1982.

In this action Batayola claimed retroactive seniority and backpay with prejudgment interest from April 2, 1982, the date he would have become a full-time driver had he been selected in the first recruitment period. The magistrate found the claimed benefit was based on merit, not continued employment, and was not a benefit covered by the Veterans Readjustment Assistance Act. Batayola timely appeals the grant of summary judgment for Metro.

#### STANDARD OF REVIEW

We review de novo a summary judgment ruling

on questions of law concerning statutory interpretation. **Trinity County Public Utilities District v. Harrington**, 781 F.2d 163 (9th Cir. 1986).

### **The Benefit**

The Veterans Readjustment Assistance Act of 1974 provides that upon return from military leave, an employee shall be restored "to such position or to a position of like seniority, status and pay." 38 U.S.C. §2021(a)(B)(i). The Act applies to reservists as well as returning veterans. 38 U.S.C. § 2024(a)-(b). See also 38 U.S.C. §2021(b)(3).

The Act incorporates the "escalator principle" described in **Fishgold v. Sullivan Drydock & Repair Corp.**, 328 U.S. 275, 284-85, 66 S.Ct. 1105, 1110-11, 90 L.Ed.2d 1230(1946). A veteran does not re-enter at the exact point he left his employment, but is entitled to a status he would have enjoyed if he had been employed continuously. 38 U.S.C. 2021(b)(2).

Batayola contends his right to apply for a

full-time position is the benefit protected by the Act because of his status as a part-time employee, but he seeks a retroactive award of the position as a remedy.

A claimed benefit is protected under the Act if it is reasonably certain to occur from continued employment. **Tilton v. Missouri Pacific Railroad Co.**, 376 U.S. 169, 84 S.Ct. 595, 11 L.Ed2d 590 (1964) (interpreting **McKinney v. Missouri-Kansas-Texas R.R.**, 357 U.S. 265, 78 S. Ct. 1222, 2 L.Ed.2d 1305 (1958)). The Act protects a missed opportunity to transfer only if a plaintiff can show that the transfer would have occurred had he been continuously employed. **McKinney**, 357 U.S. at 272, 78 S.Ct. at 1226-27.

We reject Batayola's contention that because he had a right to apply, he also had a right to a full-time position. The selection process was based on merit. He cannot show with reasonable certainty that full-time positions were awarded by virtue of continuous employment. Here, advancement to full-time driver was based on the

applicants' fitness and ability. Considerations of fitness and ability create enough doubt about Batayola's selection for a full-time position that the reasonable certainty test is not satisfied.

#### CONCLUSION

The transfers to full-time positions here depend more on fitness and ability than continued employment. Batayola cannot claim it was reasonably certain that, but for his military leave, he would have become a full-time driver based on his continued employment as the Act requires. The magistrate correctly found that the benefit claimed by Batayola here is not covered by the Veterans Readjustment Assistance Act.

AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I dissent. The Veterans Readjustment Assistance Act of 1974 protects the right of veterans and reservists to take advantage of

opportunities for advancement in employment available to employees who do not perform military service. The Municipality of Metropolitan Seattle violated that right by refusing to provide Batayola with the opportunity to apply for a full-time position as a bus driver upon his return from military reserve duty training. In concluding that because Batayola cannot claim with reasonable certainty that he would have been promoted to full-time driver had he been given the opportunity to apply, "the benefit claimed by Batayola...is not covered by the...Act," (majority opinion at 357) the majority confuses two related but different statutory rights. It applies law that is relevant to a claim of one such right (the right to automatic promotion) to a claim of a separate right (the right to take a promotional examination), although the latter claim is governed by entirely different legal principles.

#### A. FACTS

Batayola was afforded a one-month leave of

absence, for military reserve training, from his job as part-time bus driver for the Municipality of Metropolitan Seattle. For one week during his absence, the Municipality solicited applications from part-time drivers for full-time positions and administered the test described by the majority opinion. The Municipality did not give notice of the upcoming application period prior to the commencement of Batayola's leave. Immediately upon his return, Batayola requested the opportunity to apply for a full-time position. The Municipality denied his request on the ground that the application period had closed. The record does not disclose any other reason why the Municipality was unable or unwilling to accept Batayola's application.

One aspect of the Municipality's application and promotion procedure needs emphasis: The examination administered during Batayola's absence served only to qualify individuals as eligible for future promotion. The Municipality offered actual promotions to those who received

sufficiently high scores when and as it needed additional full-time drivers, and then according to the applicant's seniority. The purpose of the application and examination process in other words was not to fill a certain number of full-time positions immediately, but rather to create a pool of qualified drivers.

#### B. ANALYSIS

As the majority notes, the Veterans Readjustment Assistance Act of 1974 incorporates the "escalator principle" from a predecessor act, the Selective Training and Service Act of 1940, re-enacted as the Military Selective Service Act of 1967. *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 195-96, 100 S.Ct. 2100, 2104-05, 65 L.Ed.2d 53 (1980). Under that principle, a returning veteran or reservist "'does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously.'" *Id.* at 196, 100 S.Ct. at 2104 (quoting *Fishgold v. Sullivan Drydock & Repair*

Corp., 328 U.S. 275, 284-85, 66 S.Ct. 1105, 1110-11, 90 L.Ed. 1230 (1946)). The protection to seniority afforded returning military personnel by the original military service act of 1940 and by each successor act assures that the veteran or reservist will "not lose ground by reason of his absence." **Fishgold**, 328 U.S. at 285, 66 S.Ct. at 1111. The Veterans Readjustment Assistance Act also guarantees that a reservist will "not be denied...any promotion or other incident or advantage of employment because of any obligation" to the Reserves. 38 U.S.C. §2021(b)(3) (1982).

Unless the Municipality's refusal to allow Batayola to apply for a full-time position upon his return from reserve duty was based on a valid work-related reason, the Municipality violated its obligation to restore Batayola to the same status and seniority as he would have enjoyed had he been employed continuously, 38 U.S.C. §2024(d), as well as its obligation to not deny him any promotion or other incident or advantage

of employment, 38 U.S.C. § 2021(b)(3). The guarantees of the Act were "designed to enable reservists...to enjoy all the employment opportunities and benefits accorded their coworkers who do not have military training obligations." Hearings on H.R. 11509 before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. 5312 (1966) (statement of Hugh W. Bradley, Director of the Office of Veterans' Reemployment Rights of the Labor Department)(emphasis added)(quoted in **Monroe v. Standard Oil Co.**, 452 U.S. 549, 558-59, 101 S.Ct. 2510, 2516, 69 L.Ed.2d 226 (1981)). The guarantee against a denial of promotion or any other incident or advantage of employment must extend to opportunities for promotion as well. If returning reservists are denied the opportunity to compete for a promotion, they in effect "lose ground by reason of [their] absence," **Fishgold**, 328 U.S. at 285, 66 S.Ct. at 1111. Whereas Batayola's coworkers were given an opportunity to advance, Batayola was held back

for a year simply because the promotional tests were administered in his absence. Batayola thus did "not step back on the seniority escalator at the...precise point he could have occupied had he kept his position continuously," *id.*, 328 U.S. at 284-85, 66 S.Ct. at 1110-11. The chance to compete for advancement is an "incident" or "advantage" of employment, 38 U.S.C. § 2021(b)(3), which may not be denied a reservist because of his or her military obligations.

Batayola made out of *prima facie* case that the Municipality violated his rights under the Veterans Readjustment Assistance Act by refusing to allow him to apply for a full-time position when he returned from training duty. The Act must be given a practical, common-sense meaning. An employer may have valid reasons for such a refusal. Had the Municipality needed to fill a certain number of full-time positions immediately and done so prior to Batayola's return, it would undoubtedly not be required under the Act to readminister the examination for openings that no

longer existed. Such, however, was not the case here since the application process merely established a list of employees qualified for future promotion. Alternatively, if invoking the examination process for Batayola would have entailed disruption to the Municipality's normal operations or if the Municipality had called in experts to administer the examinations who were no longer available, the Municipality might have been justified in refusing to allow Batayola to apply. The record, however, is devoid of any evidence explaining the Municipality's refusal and, when asked at oral argument, the Municipality failed to offer any reason for its unwillingness to administer the test to Batayola. Rather, it rested its argument entirely on its legal theory that because Batayola was absent when the tests were administered he forfeited any right to be considered for promotion. Under these circumstances Batayola is entitled to summary judgment on the issue of the Municipality's

liability under the Act. The majority decision affirming the grant of summary judgment to the Municipality is, in my opinion, erroneous.

Batayola's claim is readily distinguishable from the reservist's claim rejected by the Supreme Court in **Monroe v. Standard Oil Co.**, 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed.2d 226 (1981). Monroe contended that his employer denied him an "incident or advantage" of employment under 38 U.S.C. § 2021(b)(3) by failing "to schedule his work hours so he would avoid any lost time by reason of his reserve obligations," *id.* at 560, 101 S.Ct. at 2517. The Court held that Monroe failed to state a claim under the Act, noting that "[t]here is no evidence that the Congress that enacted § 2021(b)(3) showed any concern with the problem of missed work hours," *id.* at 564, 101 S.Ct. at 2519. The "purpose of the legislation was to protect employee reservists from discharge, denial of promotional opportunities, or other comparable adverse treatment solely by reason of their military

obligations; there was never any suggestion of employer responsibility to provide preferential treatment." *Id.* at 562, 101 S.Ct. at 2518 (first emphasis added)(second emphasis in original).

The majority's application of the "reasonable certainty" test of *Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 169, 180, 84 S.Ct. 595, 602, 11 L.Ed.2d 590 (1964), to Batayola's claim misconstrues the nature of his claim. *Tilton* is applicable where the employee claims he has an automatic right, under the escalator principle, to the promotion itself, not where an employee claims he has a right to take a promotional examination. The majority confuses the right which Batayola alleges the Municipality violated with the remedy Batayola seeks for the violation of that right.

The majority concludes that the Municipality did not violate Batayola's right to apply for a full-time position because he did not prove that he would have received a promotion: "We reject Batayola's contention that because he had a right

to apply, he also had a right to a full-time position.... He cannot show with reasonable certainty that ... but for his military leave, he would have become a full-time driver based on his continued employment as the Act requires." Majority opinion at 357. This analysis is seriously flawed. The Supreme Court developed the "reasonable certainty" test for evaluating veterans' claims that they had an automatic right to immediate promotion solely by virtue of their continued employment. The Court held that "Congress intended a reemployed veteran, who...satisfactorily completes his interrupted training, to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service." **Tilton**, 376 U.S. at 181, 84 S.Ct. at 602. In order to establish a right to an automatic promotion a returning veteran (or reservist) must show that "as a matter of foresight, it was reasonably certain that advancement would have occurred, and [that], as a

matter of hindsight, it did in fact occur." *Id.* A veteran (or reservist) cannot make that showing as a matter of law "where advancement depends on an employer's discretionary choice not exercised prior to entry into service." *Id.* at 180, 84 S.Ct. at 602 (interpreting *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed.2d 1305 (1958)).

Here, Batayola does not claim that he had a right to an automatic promotion upon his return from reserve duty, but rather that he had a right to apply for a promotion and to take the examination. He seeks retroactive seniority and backpay as a remedy for the Municipality's refusal to allow him to apply for a full-time position. There is no basis in reason or precedent for using the "reasonable certainty" test in determining whether the Municipality violated the Act when it denied Baytayola the opportunity to take the examination. To the contrary, whether or not Batayola would have obtained a sufficiently high score on the

examination to qualify for future promotion, the Act was violated. Moreover, on that question Batayola would pass the "reasonable certainty" test with flying colors. It is more than reasonably certain that he would have taken the examination had he not been on reserve duty. No one disputes that point.

It seems clear that a violation of the Act occurred. The real question is whether Batayola suffered an injury that entitles him to the relief he seeks. Had Batayola filed an action the day after the Municipality refused to allow him to apply for a full-time position and sought immediate relief, an appropriate remedy might have been an injunction ordering the Municipality to permit him to take the test. Now, however, Batayola seeks only actual monetary damages, including those resulting from loss of seniority. Batayola is entitled to prove his claim that he suffered monetary damages in accordance with the rules normally applicable to damage claims. In this case Batayola's entitlement to monetary

damages is dependent on a determination whether he would have passed the test and, if so, when he would have been promoted. If Batayola would not have passed the examinations in 1982, his damages would be nominal at best. However, he has presented sufficient evidence in support of his claim that he would have been promoted in 1982 to at least raise a material factual issue and thus to avoid an adverse summary judgment on the damages issue. In fact, the evidence that he would have passed the test is sufficiently persuasive that summary judgment in his favor on the damages issue as well (except for the amount) may, in fact, be the proper result.

Finally, although I need not reach the question whether Batayola could meet the reasonable certainty test if applied (as the majority suggests) to the promotion itself, I find the majority's argument that he could not do so less than compelling. I think the answer to that question may depend on whether we consider the "situational response" portion of the

examination to constitute an objective or subjective test and on whether it is clear that an individual's performance on that part of the examination would not differ materially from his performance in the immediately preceding year. I am inclined to believe that an exploration of the factual issues is required and therefore that summary judgment for the Municipality is inappropriate even under the majority's view of the law.

I would reverse the grant of summary judgment to the Municipality, grant summary judgment in Batayola's favor on the issue of liability and remand to the district court so that it may determine the proper amount of the damages.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LUIS I. BATAYOLA,	)	
	)	
Plaintiff	)	
	)	NO. C84-1475PKS
v.	)	
	)	MEMORANDUM
MUNICIPALITY OF	)	ORDER
METROPOLITAN SEATTLE,	)	
a municipal corporation,	)	
	)	
Defendant.	)	
	)	

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The Court, having consider the Motion for Summary Judgment filed by defendant Municipality of Metropolitan Seattle (METRO), plaintiff's response thereto, and the balance of the records and files in the case, finds and rules as follows:

(1) Plaintiff Luis Batayola joined METRO on May 8, 1980, as a part-time transit operator. On February 16, 1982, he began a leave of absence to perform reserve military duty. In plaintiff's absence METRO accepted applications from part-time transit operators to transfer to full-time positions.

(2) The opportunity to transfer was not automatic. Regardless of seniority, part-time transit operators had to successfully complete a video test and undergo two separate interviews to be eligible for transfer to a full-time position. Transfer was based on merit, not seniority, and 44 part-time operators with greater seniority than plaintiff were rejected.

(3) Plaintiff returned from military duty on March 17, 1982, and returned to his position as a part-time transit operator the following day. Plaintiff attempted to apply for a full-time position at that time but the application period had closed. Plaintiff subsequently applied during the next application period. He was selected for training, and after completion of training, was hired as a full-time transit operator effective May 26, 1983. The application and selection process utilized in the first recruitment period was virtually the same as that utilized for plaintiff's 1983 selection. The two separate personal interviews

were the only aspects of the recruitment process involving management discretion.

(4) The transfer involved is not covered by the Vietnam Era Veteran's Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021-2026, because it was not given automatically and solely by virtue of continuous employment. **McKinney v. Missouri-Kansas-Texas(sic) R. R. Co.**, 357 U.S. 265 (1958); **Horton v. United States Steel Corp.**, 286 F. 2d 710 (5th Cir. 1961). If a transfer or promotion is at least partially dependent on the employer's discretionary determination of fitness and ability, the Act does not award the verteran (sic) a right to the transfer or promotion. **Goggin v. St. Louis**, 702 F. 2d 698 (8th Cir. 1983).

(5) There is no genuine issue of material fact with respect to the question of whether the transfer involved here was automatic and thus a perquisite of seniority. As a matter of law, it was not, and defendant is entitled to summary

judgment in its favor.

(6) The Clerk is directed to enter judgment in favor of defendant Municipality of Metropolitan Seattle, dismissing plaintiff's complaint with costs to defendant.

(7) The clerk is to direct copies of this Memorandum Order to all counsel of record.

DATED this 26th day of April, 1985.

Philip K. Sweigert  
U.S. Magistrate

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LOUIS (sic) I. BATAYOLA	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	Docket No.
	)	C84-1475PKS
MUNICIPALITY OF METROPOLITAN	)	
Seattle, a municipal corp.	)	JUDGMENT
	)	
Defendant	)	
	)	
	)	

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This action came on for hearing before the court, United States District Magistrate Philip K. Swigert (sic) presiding. The issues having been duly heard and a decision having been duly entered, it is ordered and adjudged. . . . .

. . . Judgment is ENTERED is (sic) favor of Defendant Municipality of Metropolitan Seattle, dismissing Plaintiff's complaint with costs to defendant.

Dated at: Western District Seattle

Date: April 29, 1985

Gail H. Johnson  
Deputy Clerk of the Court

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LUIS I. BATAYOLA,	)	
	)	
Plaintiff	)	Case #C84-1475PKS
	)	
v.	)	STIPULATION AND
	)	ORDER AMENDING
MUNICIPALITY OF METROPOLITAN	)	JUDGMENT
SEATTLE, a municipal	)	
corporation,	)	
	)	
Defendant.	)	
	)	

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STIPULATION

The plaintiff, Luis I. Batayola, by and through his attorneys, the U. S. Department of Labor and William W. Kates, and the defendant Municipality of Metropolitan Seattle (the "Municipality"), by and through its attorneys, Preston, Thorgrimson, Ellis & Holman and Marc R. Kittner, hereby stipulate to the amendment of the court's Memorandum Order dated April 26, 1985 by deleting the words "with costs to defendant" from paragraph 6 thereof. This change is in conformance with 38 U.S.C. § 2022. The amendment may be ordered without further notice to the parties.

ENTERED INTO AND APPROVED, this 7th day of  
May, 1985.

PRESTON, THORGRIMSON, ELLIS &  
HOLMAN

Marc R. Kittner  
Marc R. Kittner  
Attorneys for Defendant  
Municipality of Metropolitan  
Seattle

OFFICE OF THE SOLICITOR  
U. S. DEPARTMENT OF LABOR

William W. Kates  
William W. Kates  
Attorneys for Plaintiff  
Luis I. Batayola

ORDER

Paragraph 6 of this court's Memorandum  
Order dated April 26, 1985 is hereby amended by  
deleting the words "with costs to defendant."  
The Clerk is directed to amend the Judgment,  
dated April 29, 1985, accordingly.

ORDERED this 13th day of May, 1985.

PHILIP K. SWEIGERT  
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LOUIS (sic) I. BATAYOLA	) Civil Action
	) Docket No.
Plaintiff,	) C84-1475PKS
	)
v.	)
	) JUDGMENT
MUNICIPALITY OF METROPOLITAN	)
Seattle, a municipal corp.	)
	)
Defendant	)
	)
	)

---

This action came on for hearing before the court, United States District Magistrate Philip K. Sweigert presiding. The issues having been duly heard and a decision having been duly rendered, it is ordered and adjudged.....

Judgment is ENTERED in favor of the Defendant Municipality of Metropolitan Seattle, dismissing plaintiff (sic) complaint.

Dated at: Western District Seattle

Date: May 14, 1985

Gail H. Johnson  
Deputy Clerk of the Court

APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LUIS I BATAYOLA,	)	
	)	No. 85-3884
Plaintiff-Appelant,	)	
	)	
vs.	)	DC# C 84-1475
	)	
MUNICIPALITY OF METROPOLITAN	)	OPINION
SEATTLE,	)	
	)	
Defendant-Appellee	)	

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Appeal from the United States District Court  
for the Western District of Washington  
Magistrate Philip K. Sweigert, Presiding  
(Argued and Submitted March 4, 1986-Seattle)

Before: WRIGHT, TANG, and REINHARDT, Circuit  
Judges.

WRIGHT, Circuit Judge.

In this case we are asked to decide whether  
a part-time employee may be awarded backpay and  
seniority under the Veterans Readjustment  
Assistance Act as a remedy for missing an  
opportunity to apply for a full-time position  
while on military reserve duty training. The  
magistrate found the claimed benefit was not

covered by the Act. We agree and affirm the decision below.

#### FACTS

Batayola began to work as a part-time bus driver for the Municipality of Metropolitan Seattle (Metro) in May 1980. In February 1982, he took a one month leave of absence for Marine Corps reserve duty training. During his absence, Metro solicited applications from part-time bus drivers for full-time positions. When Batayola returned in March 1982, he was reinstated to his part-time position. He attempted to apply for a full-time position, but Metro refused because the recruitment period had ended.

Metro had received 423 applications for full-time work. The application process included performance evaluations, situational response video tests, and personal interviews. Based on Metro's cutoff score, only 105 of the 426 applicants proceeded to personal interview. Successful applicants from the interviews were recommended for full-time positions and selected

by seniority for training. Upon completion of the training, 97 applicants became full-time drivers.

During a new recruitment period in 1983, Batayola was selected for a full-time position, worked briefly for Metro, resigned and is no longer employed as a driver. He has no seniority rights with Metro. Metro concedes the selection process in 1983 was almost identical to that used in 1982.

In this action Batayola claimed retroactive seniority and backpay with prejudgment interest from April 2, 1982, the date he would have become a full-time driver had he been selected in the first recruitment period. The magistrate found the claimed benefit was based on merit, not continued employment, and was not a benefit covered by the Veterans Readjustment Assistance Act. Batayola timely appeals the grant of summary judgment for Metro.

#### STANDARD OF REVIEW

We review de novo a summary judgment ruling

on questions of law concerning statutory interpretation. *Trinity County Public Utilities District v. Barrington*, 781 F.2d 163 (9th Cir. 1986).

### **The Benefit**

The Veterans Readjustment Assistance Act of 1974 provides that upon return from military leave, an employee shall be restored "to such position or to a position of like seniority, status and pay." 38 U.S.C. § 2021(a)(B)(i). The Act applies to reservists as well as returning veterans. 38 U.S.C. § 2024(a)-(b). See also 38 U.S.C. § 2021(b)(3).

The Act incorporates the "escalator principle" described in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85, 66 S.Ct. 1105, 1110-11, 90 L.Ed.2d 1230 (1946). A veteran does not re-enter at the exact point he left his employment, but is entitled to a status he would have enjoyed if he had been employed continuously. 38 U.S.C. § 2021(b)(2).

Batayola contends his right to apply for a

full-time position is the benefit protected by the Act because of his status as a part-time employee, but he seeks a retroactive award of the position as a remedy.

A claimed benefit is protected under the Act if it is reasonably certain to occur from continued employment. **Tilton v. Missouri Pacific Railroad Co.**, 376 U.S. 169, 84 S.Ct. 595, 11 L.Ed2d 590 (1964) (interpreting **McKinney v. Missouri-Kansas-Texas R.R.**, 357 U.S. 265, 78 S. Ct. 1222, 2 L.Ed.2d 1305 (1958)). The Act protects a missed opportunity to transfer only if a plaintiff can show that the transfer would have occurred had he been continuously employed. **McKinney**, 357 U.S. at 272, 78 S.Ct. at 1226-27.

We reject Batayola's contention that because he had a right to apply, he also had a right to a full-time position. The selection process was based on merit. He cannot show with reasonable certainty that full-time positions were awarded by virtue of continuous employment. Here, advancement to full-time driver was based on the

applicants' fitness and ability. Substantial employer discretion was involved in the testing and subjective interviews.

#### CONCLUSION

The transfers to full-time positions here depend more on fitness and ability than continued employment. Batayola cannot claim it was reasonably certain that, but for his military leave, he would have become a full-time driver based on his continued employment as the Act requires. The magistrate correctly found that the benefit claimed by Batayola here is not covered by the Veterans Readjustment Assistance Act.

AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I dissent. The Veterans Readjustment Assistance Act of 1974 protects the right of veterans and reservists to take advantage of opportunities for advancement in employment available to employees who do not perform

military service. The Municipality of Metropolitan Seattle violated that right by refusing to provide Batayola with the opportunity to apply for a full-time position as a bus driver upon his return from military reserve duty training. In concluding that because Batayola cannot claim with reasonable certainty that he would have been promoted to full-time driver had he been given the opportunity to apply, "the benefit claimed by Batayola...is not covered by the...Act," (majority opinion at 357) the majority confuses two related but different statutory rights. It applies law that is relevant to a claim of one such right (the right to automatic promotion) to a claim of a separate right (the right to take a promotional examination), although the latter claim is governed by entirely different legal principles.

#### A. FACTS

Batayola was afforded a one-month leave of absence, for military reserve training, from his job as part-time bus driver for the Municipality

of Metropolitan Seattle. For one week during his absence, the Municipality solicited applications from part-time drivers for full-time positions and administered the test described by the majority opinion. The Municipality did not give notice of the upcoming application period prior to the commencement of Batayola's leave. Immediately upon his return, Batayola requested the opportunity to apply for a full-time position. The Municipality denied his request on the ground that the application period had closed. The record does not disclose any other reason why the Municipality was unable or unwilling to accept Batayola's application.

One aspect of the Municipality's application and promotion procedure needs emphasis: The examination administered during Batayola's absence served only to qualify individuals as eligible for future promotion. The Municipality offered actual promotions to those who received sufficiently high scores when and as it needed additional full-time drivers, and then according

to the applicant's seniority. The purpose of the application and examination process in other words was not to fill a certain number of full-time positions immediately, but rather to create a pool of qualified drivers.

#### B. ANALYSIS

As the majority notes, the Veterans Readjustment Assistance Act of 1974 incorporates the "escalator principle" from a predecessor act, the Selective Training and Service Act of 1940, re-enacted as the Military Selective Service Act of 1967. *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 195-96, 100 S.Ct. 2100, 2104-05, 65 L.Ed.2d 53 (1980). Under that principle, a returning veteran or reservist "'does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously.'" *Id.* at 196, 100 S.Ct. at 2104 (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85, 66 S.Ct. 1105, 1110-11, 90 L.Ed. 1230 (1946)). The protection to

seniority afforded returning military personnel by the original military service act of 1940 and by each successor act assures that the veteran or reservist will "not lose ground by reason of his absence." **Fishgold**, 328 U.S. at 285, 66 S.Ct. at 1111. The Veterans Readjustment Assistance Act also guarantees that a reservist will "not be denied...any promotion or other incident or advantage of employment because of any obligation" to the Reserves. 38 U.S.C. §2021(b)(3) (1982).

Unless the Municipality's refusal to allow Batayola to apply for a full-time position upon his return from reserve duty was based on a valid work-related reason, the Municipality violated its obligation to restore Batayola to the same status and seniority as he would have enjoyed had he been employed continuously, 38 U.S.C. §2024(d), as well as its obligation to not deny him any promotion or other incident or advantage of employment, 38 U.S.C. §2021(b)(3). The guarantees of the Act were "designed to enable

reservists...to enjoy all the employment opportunities and benefits accorded their coworkers who do not have military training obligations." Hearings on H.R. 11509 before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. 5312 (1966) (statement of Hugh W. Bradley, Director of the Office of Veterans' Reemployment Rights of the Labor Department)(emphasis added)(quoted in **Monroe v. Standard Oil Co.**, 452 U.S. 549, 558-59, 101 S.Ct. 2510, 2516, 69 L.Ed.2d 226 (1981)). The guarantee against a denial of promotion or any other incident or advantage of employment must extend to opportunities for promotion as well. If returning reservists are denied the opportunity to compete for a promotion, they in effect "lose ground by reason of [their] absence," **Fishgold**, 328 U.S. at 285, 66 S.Ct. at 1111. Whereas Batayola's coworkers were given an opportunity to advance, Batayola was held back for a year simply because the promotional tests were administered in his absence. Batayola thus

did "not step back on the seniority escalator at the...precise point he could have occupied had he kept his position continuously," *id.*, 328 U.S. at 284-85, 66 S.Ct. at 1110-11. The chance to compete for advancement is an "incident" or "advantage" of employment, 38 U.S.C. § 2021(b)(3), which may not be denied a reservist because of his or her military obligations.

Batayola made out of *prima facie* case that the Municipality violated his rights under the Veterans Readjustment Assistance Act by refusing to allow him to apply for a full-time position when he returned from training duty. The Act must be given a practical, common-sense meaning. An employer may have valid reasons for such a refusal. Had the Municipality needed to fill a certain number of full-time positions immediately and done so prior to Batayola's return, it would undoubtedly not be required under the Act to readminister the examination for openings that no longer existed. Such, however, was not the case here since the application process merely

established a list of employees qualified for future promotion. Alternatively, if invoking the examination process for Batayola would have entailed disruption to the Municipality's normal operations or if the Municipality had called in experts to administer the examinations who were no longer available, the Municipality might have been justified in refusing to allow Batayola to apply. The record, however, is devoid of any evidence explaining the Municipality's refusal and, when asked at oral argument, the Municipality failed to offer any reason for its unwillingness to administer the test to Batayola. Rather, it rested its argument entirely on its legal theory that because Batayola was absent when the tests were administered he forfeited any right to be considered for promotion. Under these circumstances Batayola is entitled to summary judgment on the issue of the Municipality's liability under the Act. The majority decision affirming the grant of summary judgment to the Municipality is, in my opinion, erroneous.

Batayola's claim is readily distinguishable from the reservist's claim rejected by the Supreme Court in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed.2d 226 (1981). Monroe contended that his employer denied him an "incident or advantage" of employment under 38 U.S.C. § 2021(b)(3) by failing "to schedule his work hours so he would avoid any lost time by reason of his reserve obligations," *id.* at 560, 101 S.Ct. at 2517. The Court held that Monroe failed to state a claim under the Act, noting that "[t]here is no evidence that the Congress that enacted §2021(b)(3) showed any concern with the problem of missed work hours," *id.* at 564, 101 S.Ct. at 2519. The "purpose of the legislation was to protect employee reservists from discharge, denial of promotional opportunities, or other comparable adverse treatment solely by reason of their military obligations; there was never any suggestion of employer responsibility to provide preferential treatment." *Id.* at 562, 101 S.Ct. at 2518 (first

emphasis added)(second emphasis in original).

The majority's application of the "reasonable certainty" test of **Tilton v. Missouri Pacific Railroad Co.**, 376 U.S. 169, 180, 84 S.Ct. 595, 602, 11 L.Ed.2d 590 (1964), to Batayola's claim misconstrues the nature of his claim. **Tilton** is applicable where the employee claims he has an automatic right, under the escalator principle, to the promotion itself, not where an employee claims he has a right to take a promotional examination. The majority confuses the right which Batayola alleges the Municipality violated with the remedy Batayola seeks for the violation of that right.

The majority concludes that the Municipality did not violate Batayola's right to apply for a full-time position because he did not prove that he would have received a promotion: "We reject Batayola's contention that because he had a right to apply, he also had a right to a full-time position.... He cannot show with reasonable certainty that ... but for his military leave, he

would have become a full-time driver based on his continued employment as the Act requires." Majority opinion at 357. This analysis is seriously flawed. The Supreme Court developed the "reasonable certainty" test for evaluating veterans' claims that they had an automatic right to immediate promotion solely by virtue of their continued employment. The Court held that "Congress intended a reemployed veteran, who...satisfactorily completes his interrupted training, to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service." *Tilton*, 376 U.S. at 181, 84 S.Ct. at 602. In order to establish a right to an automatic promotion a returning veteran (or reservist) must show that "as a matter of foresight, it was reasonably certain that advancement would have occurred, and [that], as a matter of hindsight, it did in fact occur." *Id.* A veteran (or reservist) cannot make that showing as a matter of law "where advancement depends on

an employer's discretionary choice not exercised prior to entry into service." Id. at 180, 84 S.Ct. at 602 (interpreting **McKinney v. Missouri-Kansas-Texas R.R.**, 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed.2d 1305 (1958)).

Here, Batayola does not claim that he had a right to an automatic promotion upon his return from reserve duty, but rather that he had a right to apply for a promotion and to take the examination. He seeks retroactive seniority and backpay as a remedy for the Municipality's refusal to allow him to apply for a full-time position. There is no basis in reason or precedent for using the "reasonable certainty" test in determining whether the Municipality violated the Act when it denied Baytaylor the opportunity to take the examination. To the contrary, whether or not Batayola would have obtained a sufficiently high score on the examination to qualify for future promotion, the Act was violated. Moreover, on that question Batayola would pass the "reasonable certainty"

test with flying colors. It is more than reasonably certain that he would have taken the examination had he not been on reserve duty. No one disputes that point.

It seems clear that a violation of the Act occurred. The real question is whether Batayola suffered an injury that entitles him to the relief he seeks. Had Batayola filed an action the day after the Municipality refused to allow him to apply for a full-time position and sought immediate relief, an appropriate remedy might have been an injunction ordering the Municipality to permit him to take the test. Now, however, Batayola seeks only actual monetary damages, including those resulting from loss of seniority. Batayola is entitled to prove his claim that he suffered monetary damages in accordance with the rules normally applicable to damage claims. In this case Batayola's entitlement to monetary damages is dependent on a determination whether he would have passed the test and, if so, when he would have been promoted. If Batayola would not

have passed the examinations in 1982, his damages would be nominal at best. However, he has presented sufficient evidence in support of his claim that he would have been promoted in 1982 to at least raise a material factual issue and thus to avoid an adverse summary judgment on the damages issue. In fact, the evidence that he would have passed the test is sufficiently persuasive that summary judgment in his favor on the damages issue as well (except for the amount) may, in fact, be the proper result.

Finally, although I need not reach the question whether Batayola could meet the reasonable certainty test if applied (as the majority suggests) to the promotion itself, I find the majority's argument that he could not do so less than compelling. I think the answer to that question may depend on whether we consider the "situational response" portion of the examination to constitute an objective or subjective test and on whether it is clear that an individual's performance on that part of the

examination would not differ materially from his performance in the immediately preceding year. I am inclined to believe that an exploration of the factual issues is required and therefore that summary judgment for the Municipality is inappropriate even under the majority's view of the law.

I would reverse the grant of summary judgment to the Municipality, grant summary judgment in Batayola's favor on the issue of liability and remand to the district court so that it may determine the proper amount of the damages.

## APPENDIX C

38 U.S.C. § 2022 provides as follows:

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter.



## APPENDIX D

38 U.S.C. § 2021 provides as follows:

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay;

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored and reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged

from such position without cause within one year after such restoration or reemployment.

(b)(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

(b)(3) Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

## APPENDIX E

38 U.S.C. § 2024 provides as follows:

(a) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise, performed by such person after August 1, 1961, does not exceed five years, and if the service in excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose of determining physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such active duty performed between June 24, 1948, and August 1,

1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not

been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.